78-1110

Supreme Court, U. S.
FILED
JAN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM JOHN BEER, Judge, Oakland County Circuit Court, As a Candidate and Citizen,
Petitioner,

vs.

SECRETARY OF STATE OF THE STATE OF MICHIGAN, and THE CLERK OF THE COUNTY OF OAKLAND,
Respondents.

No. A-498

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM JOHN BEER, Judge,
Oakland County Circuit
Court, As a Candidate
and Citizen,
Petitioner,

vs. No. A-498

SECRETARY OF STATE OF THE
STATE OF MICHIGAN, and
THE CLERK OF THE COUNTY
OF OAKLAND,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Now comes the Petitioner, WILLIAM JOHN BEER, by and through his attorneys HALL & ANDARY, P.C., and in support of his Petition for Writ of Certiorari, indicate as follows:

1. That the Petitioner, WILLIAM JOHN BEER, is a Circuit Judge of the Sixth Judicial Circuit of the State of Michigan, term expiring January 1, 1981, and is presently sixty-nine (69) years of age.

2. That the Respondent, SECRETARY OF STATE OF THE STATE OF MICHIGAN, has jurisdiction and authority to certify candidates for judicial office in the State of Michigan.

3. That the Respondent, OAKLAND COUNTY ELECTION COMMISSION, has the responsibility for listing all eligible voters in Oakland County and the orderly handling of all elections in that county.

4. That in June, 1978, Michael S. Friedman, a candidate for one of the three new circuit judgeships in the Sixth

Judicial Circuit, filed a complaint for Declaratory Judgment in the Oakland County Circuit Court and a Complaint for Mandamus, Motion for Order to Show Cause and Motion for Immediate Consideration in the Court of Appeals for the State of Michigan, to declare the Petitioner, WILLIAM JOHN BEER, who had also filed as an incumbent for one of the three new judgeships, ineligible, and further requesting that his name be striken from the ballot or the incumbency designation stricken.

5. That the Oakland County Circuit Court and the Court of Appeals for the State of Michigan rendered decisions, (see Exhibits A and B attached) denying the relief requested by the Plaintiff, Michael Friedman, and thus permitting the name of WILLIAM J. BEER to remain on the ballot with the incumbency designation.

6. That a further appeal to the Michigan Supreme Court was taken by Michael Friedman with that court ruling that the Secretary of State *delete* the name of WILLIAM JOHN BEER from the list of candidates certified for the August 8, 1978, Sixth Judicial Circuit Primary. (See Exhibit C attached).

7. That the ruling by the Michigan Supreme Court violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by giving different treatment to the Plaintiff than other candidates running for the same office, in clear violation of the plain language of §4, 1978 P.A. 164, the act which created the three new judgeships in the Sixth Judicial Circuit Court of Michigan.

8. *That the jurisdiction of this Court is invoked pursuant to 28 USC §1257(2) in that a question of the validity of a State Statute is involved, the interpretation being repugnant to the Constitution of the United States.*

9. That this Honorable Court is requested to review the Opinion of the Michigan Supreme Court (See Exhibit C

attached), issued July 31, 1978, with rehearing denied August 8, 1978.

10. That your Petitioner is sixty-nine (69) years of age and well known by various members of the Michigan Supreme Court by reason of his attendance at judge's meetings and the matters submitted to said court appealing Petitioner's decisions.

11. That to permit Petitioner to run for the newly created judgeships would take him well beyond the age of seventy (70).

12. That although §4 of 1978 P.A. 164 clearly gives Petitioner the right to run for the office of Circuit Judge it is contrary to Article 6 §19 of the Michigan Constitution which requires that a judge cannot run for re-election after attaining the age of seventy (70) years.

QUESTIONS FOR REVIEW

I. IS THE INTERPRETATION BY THE MICHIGAN SUPREME COURT OF ACT 164 OF PUBLIC ACTS OF 1978, DEPRIVING THE PETITIONER, AN INCUMBENT JUDGE, OF RUNNING FOR A NEWLY CREATED JUDGESHIP, REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

II. IS IT CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO DEPRIVE AN INCUMBENT JUDGE FROM RUNNING FOR A NEWLY CREATED JUDGESHIP IF THE TERM OF OFFICE WOULD EXTEND WELL BEYOND THE AGE OF SEVENTY YEARS CONTRARY TO ARTICLE 6, §19 OF THE MICHIGAN CONSTITUTION?

FACTS

The Michigan Legislature passed in 1978 P.A. 164, which provided for additional Circuit Judges in the Sixth Judicial Circuit, consisting of Oakland County in the State of Michigan. Judge William John Beer (sixty-nine years of age), filed for the newly created office pursuant to Section 4, which reads as follows:

> The new judgeship authorized by this amendatory act shall appear on the ballot separate and apart from other judicial offices on the ballot in the primary and general election in the respective circuit and district court districts. If another judicial office of the same court is to be filled by election in the same circuit or district, a candidate for a new judgeship authorized in that circuit or district by this amendatory act shall indicate, at the time of filing nominating petitions, whether the candidate is filing for a new judgeship or for one of the other judicial offices of the same court to be filled by election in the applicable year. Petitions for a new judgeship created by this act shall bear signatures affixed to the petition after the effective date of this act. An elected incumbent circuit judge in a circuit in which the number of circuit judges has been increased by this amendatory act may become a candidate in the primary election for that office for any term for which a circuit judge is to be elected at the 1978 general election in that circuit by filing an affidavit of candidacy with the secretary of state not later than four days after the effective date of this amendatory act.

Action was brought in the Michigan Court of Appeals to prevent the name of William John Beer from appearing on the ballot. The Court of Appeals on June 28, 1978, unanimously upheld the right of Judge Beer to have his name to appear on the ballot accompanied with the incumbency designation.

The matter was appealed to the Michigan Supreme Court and the Court, on a five-to-one vote with Justice Ryan dissenting, reversed the Court of Appeals and ordered the Secretary of State not to include the name of William John Beer on the ballot.

The Circuit Court of Oakland County and the Court of Appeals ruled in favor of Judge Beer.

This present action is an appeal from the decision of the Michigan Supreme Court. The relief of this Court is requested to assure that Judge William John Beer is not denied his constitutional right of equal protection of the law under the Fourteenth Amendment as a candidate for the newly created position of Circuit Judge in Oakland County; and further, to assure that William John Beer is not deprived of running for the newly created judgeship because he is near age seventy (70).

ARGUMENT

I. IS THE INTERPRETATION BY THE MICHIGAN SUPREME COURT OF ACT 164 OF PUBLIC ACTS OF 1978, DEPRIVING THE PETITIONER, AN INCUMBENT JUDGE, OF RUNNING FOR A NEWLY CREATED JUDGESHIP, REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

The pertinent portion of §4, 1978, P.A. 164 reads as follows:

> "An elected incumbent circuit judge in a circuit in which the number of circuit judges has been increased by this amendatory act may become a candidate in the primary election for that office for any term for which a circuit judge is to be elected at the 1978 general election in that circuit by filing an

> affidavit of candidacy with the secretary of state not later than 4 days after the effective date of this amendatory act."

The intent of a statute should be determined, if possible, by its plain meaning from the intrinsic language in the statute itself, *First National Bank* v *Hasty*, 415 F Supp 170 (ED Mich. 1976); *Peters* v *Department of State Highways*, 66 Mich. App 560, 239 NW 2d 662 (1976); *People* v *Kincaid*, 62 Mich. App 498, 233 NW 2d (1975).

Judge Beer meets these qualifications from an intrinsic reading of the statute since he is an elected incumbent Circuit Judge.

Since the intrinsic language is plain and explicit, there is no need to examine intrinsic evidence. However, *arguendo*, no intrinsic evidence has been shown or can be shown demonstrating an intent to do other than follow the precise language of the statute.

Further, the issue of motivation or judgment of the legislature in the creation of additional judgeships is not subject to judicial review.

> One of the doctrines definitely established in the law is that if a statute appears on its face to be constitutional and valid, the court cannot inquire into the motive of the legislature.—11 AM JUR, Sec. 141, P. 181.

The meaning of a statute is not conclusively established by legislative history. Moreover, the legislative history of a statute may not compel a construction at variance with its plain words, and where the language of a statute is ambiguous, consideration of the history of the legislation is not permissible. — 73 AM JUR 2d §151. See cases: *National Labor Relations Board* v *Jones & L Steel Corp.* 301 US 1, 81 L Ed 893, 57 S Ct. 615, 108 ALR 1352; *Kuehner* v *Irving Trust Co.* 229 US 445, 81 L Ed 340, 57 S Ct 298; *Nichols* v

Commissioner of Corp & Taxn. 314 Mass 285, 50 NE 2d 76, 147 ALR 830; *Fairport, P. & E. R. CO.* v *Meredith*, 292 US 589, 78 L Ed 1446, 54 S Ct 826; *Wilbur* v *U.S.* 284 US 231, 76 L Ed 261, 52 S Ct 113.

This Court is called upon to look only at the clear intrinsic evidence in the statute itself, otherwise, the Court is violating the separation of powers and performing the legislative function. To emphasize Petitioner's position in this matter, the dissenting opinion of Justice Ryan of the Michigan State Supreme Court is quoted in its entirety as follows:

> Ryan, J.
>
> I dissent. The Legislature has created three brand new judgeships in the Sixth Judicial Circuit (1978 PA 164). The Honorable William John Beer, an elected incumbent circuit judge in that court whose term expires on January 1, 1981 claims entitlement to become a candidate in the primary election by filing an affidavit of candidacy pursuant to provision of §4, 1978 PA 164 which provides in pertinent part:
>
> > "An elected incumbent circuit judge in a circuit in which the number of circuit judges has been increased by this amendatory act may become a candidate in the primary election for that office for any term which a circuit judge is to be elected at the 1978 general election in that circuit by filing an affidavit of candidacy with the secretary of state not later than four days after the effective date of this amendatory act."
>
> Judge Beer filed an affidavit of candidacy timely and in proper form. The court now holds that Judge Beer "is not qualified to file for candidacy as an incumbent within the meaning of §4 *** [because] *** [t]he history of the amendment indicates that the legislative purpose was to permit incumbent judges

whose terms will expire on January 1, 1979 to run for the new seats".

I disagree.

The aforequoted language of the amendment is plain, simple and ambiguous in providing that "an elected incumbent circuit judge *** may become a candidate in the primary election". It does not limit such candidacy to elected circuit judges whose terms expire on any given date. My colleagues claim such limitation is found in "[t]he history of the amendment".

My research fails to disclose the existence of any such history and neither the court's order nor the pleadings of the parties indicate where it is to be found. If the Legislature intended to confer the privilege of incumbency status upon only those circuit judges whose terms expire January 1, 1979 and deny the same to all others it could be expected to have said so either in the amendatory act or elsewhere.

Since Judge Beer is "[a]n elected incumbent circuit judge in a circuit in which the number of circuit judges has been increased by [the] amendatory act", which is the category to which the Legislature has expressly and unqualifiedly extended the privilege of an incumbency designation in the forthcoming primary election, he is entitled to become a candidate by filing his affidavit of candidacy under the provision of §4.

I would deny the requested relief.

It is therefore concluded that the Michigan Supreme Court denies the Petitioner equal protection of the laws by interpreting a State Statute at variance with its plain words.

ARGUMENT

II. IS IT CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO DEPRIVE AN INCUMBENT JUDGE FROM RUNNING FOR A NEWLY CREATED JUDGESHIP IF THE TERM OF OFFICE WOULD EXTEND WELL BEYOND THE AGE OF SEVENTY YEARS CONTRARY TO ARTICLE 6, §19 OF THE MICHIGAN CONSTITUTION.

Judge Beer, presently sixty-nine (69) years of age, is an incumbent Circuit Court Judge, term expiring, January 1981. But for, the newly passed 1978 P.A. 164 which provides for three additional judges in the Sixth Judicial Circuit of Michigan, Petitioner would have to retire in January 1981 due to Article 6, §19 of the Michigan Constitution which prevents anyone beyond the age of seventy (70) from being appointed or elected to a judicial office.

There appears no logical basis for the arbitrary selection of a particular age determining the suitability of a person to hold Judicial Office. Petitioner is a healthy human being capable of handling a full daily court docket and appears able to do so for many more years.

Petitioner is aware of the Age Discrimination in Employment Act (ADEA) designed to protect workers between the ages of forty (40) and sixty-five (65). Though the Act is of no assistance in this case, the rationale is applicable to a person who desires to continue in Judicial Office past the age of seventy (70). The act is clearly designed to prohibit arbitrary age discrimination. The age of seventy (70) should not be construed as an age where mental paralysis automatically attaches. It has been held in *Hitchcock* v *Collenberg*, 353 U.S. 919 that a reasonable basis for a classification is proper as long as it is shown not to be clearly arbitrary. See also, *Auto-Rite Supply Co*, v *Mayor and Twp*

Committeemen of Woodbridge Twp, 124 A 2d 612, 41 N.J. Super. 303, In Re Careful Laundry 104 A 2d 813, 204 Md 360.

There is no reasonable basis for the constitutional provision which deprives judges of the right to further run for office beyond the age of seventy (70). The Supreme Court of the United States has demonstrated through several of its members over the years, that an arbitrary age classification has no basis in the area of the judiciary.

RELIEF

Based on the issues and arguments presented it is requested that this Honorable Court grant this Petition for Writ of Certiorari and set this matter for argument.

Respectfully submitted,

HALL & ANDARY, P.C.
By: (s) Elliott S. Hall (P14546)
Attorneys for Petitioner
2440 Buhl Building
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962-0150

Dated: January 2, 1979.

APPENDIX

Supreme Court of the United States

No. A-498

WILLIAM J. BEER, JUDGE, OAKLAND COUNTY CIRCUIT COURT,
Petitioner;

v.

SECRETARY OF STATE OF MICHIGAN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 4, 1979.

By: (s) Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 27th
day of November, 1978.

STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MICHAEL S. FRIEDMAN,
Plaintiff,

vs.

WILLIAM JOHN BEER,
Defendant,

Oakland County Circuit
Court No. 78-172429-CZ

COURT'S OPINION

The Plaintiff in the above cause comes before the Court requesting a Declaratory Judgment and an Order to Show Cause. In bringing this action, the Plaintiff relies on General Court Rule 521. The Court recognizes its discretion under the rule to accept or reject jurisdiction. The Court accepts jurisdiction.

The facts are not in dispute. The Plaintiff is a duly qualified and practicing attorney and a member of the Michigan State Bar. Further, he has qualified under the governing election laws as a candidate for one of the three new judgeships in the 6th Judicial Circuit, these judgeships being created by Act 164 of Public Acts of 1978. One of the requirements to become a qualified candidate, mandated that he file petitions signed by a given number of the electorate of the 6th Judicial District. This the Plaintiff has done.

The Defendant Beer, is a sitting Circuit Judge in the 6th Judicial Circuit. He was elected to that office. The Defendant Beer, has become a candidate for one of the three new circuit judgeships created under Act 164 of Public Acts of 1978, for the 6th Judicial Circuit. He has become a candidate for the office of Circuit Judge by filing an Affidavit of Candidacy, as provided in Michigan Constitution, Article

6, S 22. He further seeks the designation as an incumbent, in both the primary and general elections.

The Plaintiff alleges that the Defendant cannot file for one of the new judgeships as an incumbent, because in fact there can be no incumbent as the new judgeships were not in being until created by Act 164. The Plaintiff alleges that the Defendant Beer, is an incumbent only in the seat to which he was elected and for the term to which he was elected and not to any other seat in the 6th Judicial Circuit. Therefore, the Plaintiff maintains that the Defendant Beer, is not entitled to a ballot designation as an incumbent, nor is he entitled to qualify as a candidate for the new judgeship by filing an affidavit. His argument, here again, is that there is no incumbent and therefore an incumbent judge's right to file an affidavit, as opposed to petitions to qualify as a candidate, does not apply.

The Plaintiff further contends that if in fact the Defendant Beer, can file an affidavit, as opposed to petitions to qualify for office, that the enabling Legislation, to-wit, Act 164 of Public Acts of 1978, is unconstitutional in Section 8501, sub-section 4, which reads in part as follows:

> "An elected incumbent Circuit Judge in a Circuit in which the number of Circuit Judges has been increased by this amendatory act may become a candidate in the primary election for that office for any term for which a Circuit Judge is to elected at the 1978 general election in that Circuit by filing an Affidavit of Candidacy with the Secretary of State not later than four days after the effective date of this amendatory act."

Plaintiff says that this is discriminatory. It creates two classes of candidates; those who may become candidates by affidavit, while others must file petitions. Plaintiff alleges that this discrimination makes that section of the Act unconstitutional.

The Plaintiff also filed an action against the Defendant Beer and Richard H. Austin, Secretary of State for the State of Michigan, in the Court of Appeals. That action was a complaint for Mandamus, Motion for Order to Show Cause and Motion for Immediate Consideration. The Defendant Beer, filed an answer and brief in opposition to the Court of Appeals action. That, incidentally, being Court of Appeals file number 782199.

The Court of Appeals rendered an opinion in that case dated June 28, 1978, a copy of which is attached hereto and marked exhibit A.

The Court has been supplied with all of the pleadings and all of the briefs filed in the Court of Appeals action, including the brief in opposition to mandamus, filed by the Attorney General on behalf of the Secretary of State. After a careful review of all of these instruments, this Court concludes that all of the issues and the law applying thereto, bearing on the relief sought in the Circuit Court, were clearly and competently presented to the Court of Appeals in that action.

The only difference between the action in the Oakland County Circuit Court and the action in the Court of Appeals, is that Richard H. Austin, as Secretary of State, is out of the lawsuit in Circuit Court. I might add, that after reading the brief filed by the Attorney General in the Court of Appeals, that he was really "out of it" in that action also; using that phrase in the truest sense accorded it in street jargon.

Addressing the issue as to whether or not the Defendant Beer, is entitled to an incumbency designation, the Court of Appeals, as indicated in exhibit A, used the following language:

> "The right to use an incumbency designation applies to the office, not the term of office."

Addressing itself to the issue of the denial of equal protection raised by the Plaintiff, again in exhibit A, the

Court of Appeals used the following language:

> "Further it appears to this Court that the incumbency designation does *not* violate constitutional provisions for equal protection of the laws since it serves reasonable state interest such as encouraging stability and experience in the judiciary, independence in the judiciary and an informed electorate on the judiciary."

The Plaintiff in arguing his request for a Declaratory Judgment, alleges that the foregoing is dictum and that this Court is not bound by the language. By any stretch of imagination, this Court cannot consider the foregoing language as dictum. This language goes to the very heart of the issues that were presented to the Court of Appeals for determination. Therefore the language certainly cannot be construed as anything other than the Court's opinion. This Court accepts it as such.

In argument for the Declaratory Judgment, Plaintiff indicated that if the Court felt obligated to follow the decision rendered in the Court of Appeals, then the only question left for the Court would be the equal protection argument. The basis for the argument is that candidates for new judgeships were not being treated equally because the Defendant Beer, could qualify by filing an affidavit while the Plaintiff Friedman, was required to qualify by petition. I find by the language used in the judgment rendered by the Court of Appeals, that they, in fact, did address themselves to this question and found that there was no violation of any equal protection under the statutes or the constitution.

This Court, therefore, having found that exhibit A is an opinion and that the language therein is not dicta, can only make this finding. This Court owes obedience to the Court of Appeals and must apply its findings to the same issues in subsequent proceedings in the same case. The legal principle enunciated here is commonly referred to as "law of the case". The fact that the Secretary of State was not a party to the Circuit Court action is of no import.

Having reached this conclusion, the Court grants Summary Judgment to the Defendant and finds that the Defendant Beer, as it relates to the issues raised in this case, is a duly qualified candidate for one of the three new judgeships in Oakland County created by Act 164 of Public Acts of 1978 and further is entitled to the designation of "Circuit Judge" on the ballot in both the primary and general election. The complaint of the Plaintiff and his Order to Show Cause are hereby dismissed. Costs and attorney's fees are denied, a public question being involved.

Dated: July 14, 1978

By: (s) C. Ralph Kahn,
Acting Circuit Judge

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, held at the Court of Appeals in the City of Lansing, on the 28th day of June in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable Donald E. Holbrook, Presiding Judge, Robert B. Burns, Daniel F. Walsh, Judges.

MICHAEL S. FRIEDMAN,
Plaintiff,

-VS- No. 78-2199

SECRETARY OF STATE FOR THE STATE OF MICHIGAN AND WILLIAM JOHN BEER,
Defendants,

In this cause a complaint for mandamus, motion for order to show cause, and motion for immediate consideration are filed by plaintiff, and an answer in opposition having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the complaint for mandamus and motion for order to show cause be, and the same are hereby DENIED for lack of merit in the grounds presented, it appearing to this Court that the right to use an incumbency designation applies to the office, not to the term of office. See Const. 1963, art 6, §24, OAG, 1965-1966, No. 4521, p 283 (May 3, 1966); *Yunker* v *Murray*, 554 P2d 285 (Mont., 1976). Further, it appears to this Court that the incumbency designation does not violate constitutional provisions for equal protection of the laws since it serves reasonable state interests such as encouraging stability and experience in the judiciary, independence in the judiciary, and an informed electorate on the judiciary.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 30th day of June in the year of our Lord one thousand nine hundred and seventy-eight.

By: (s) Ronald L. Dzierbicki
Clerk

Room, in the City of Lansing, on the 31st day of July in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable THOMAS GILES KAVANAGH, Chief Justice. G. MENNEN WILLIAMS, CHARLES L. LEVIN, MARY S. COLEMAN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices.

FILE

CR 24-39
(24-39a)
CR 24-40
(24-40a)
(24-40b)

MICHAEL S. FRIEDMAN,
Plaintiff-Appellant,

v 61771 COA: 78-2199

SECRETARY OF STATE FOR THE STATE OF MICHIGAN AND WILLIAM JOHN BEER,
Defendants-Appellees.

MICHAEL S. FRIEDMAN,
Plaintiff-Appellant,

v 61772 LC: 78-172429-CZ

WILLIAM JOHN BEER,
Defendant-Appellee.

On order of the Court, plaintiff's motion for immediate consideration of application for leave to appeal and motion for immediate consideration of application for leave to appeal prior to decision by the Court of Appeals are

considered, and they are GRANTED. Plaintiff's motion for consolidation of the application for leave to appeal and the application for leave to appeal prior to decision by the Court of Appeals is considered, and it is GRANTED.

The application for leave to appeal and application for leave to appeal prior to decision by the Court of Appeals are considered and, pursuant to GCR 1963, 853.2(4) and 852.2(4)(g), in lieu of leave to appeal, we ORDER the Secretary of State to delete the name of William John Beer from the list of candidates certified for the August 8, 1978 Sixth Judicial Circuit primary. (It appears that Judge William John Beer's term of office as Sixth Judicial Circuit Judge does not expire until January 1, 1981, so he is not qualified to file for candidacy as an incumbent within the meaning of §4 of 1978 PA 164. The history of the amendment indicates that the legislative purpose was to permit incumbent judges whose terms will expire on January 1, 1979 to run for the new seats.)

Williams, J., not participating.

Ryan, J.

I dissent. The Legislature has created three brand new judgeships in the Sixth Judicial Circuit (1978 PA 164). The Honorable William John Beer, an elected incumbent circuit judge in that court whose term expires on January 1, 1981 claims entitlement to become a candidate in the primary election by filing an affidavit of candidacy pursuant to provision of §4, 1978 PA 164 which provides in pertinent part:

> "An elected incumbent circuit judge in a circuit in which the number of circuit judges has been increased by this amendatory act may become a candidate in the primary election for that office for any term for which a circuit judge is to be elected at the 1978 general election in that circuit by filing an affidavit of candidacy with the secretary of state not later than 4 days after the effective date of this amendatory act."

Judge Beer filed an affidavit of candidacy timely and in proper form. The court now holds that Judge Beer "is not qualified to file for candidacy as an incumbent within the meaning of §4 * * * [because] * * * [t]he history of the amendment indicates that the legislative purpose was to permit incumbent judges whose terms will expire on January 1, 1979 to run for the new seats."

I disagree.

The aforequoted language of the amendment is plain, simple and unambiguous in providing that "an elected incumbent circuit judge * * * may become a candidate in the primary election". It does not limit such candidacy to elected circuit judges whose terms expire on any given date. My colleagues claim such a limitation is found in "[t]he history of the amendment".

My research fails to disclose the existence of any such history and neither the court's order nor the pleadings of the parties indicate where it is to be found. If the Legislature intended to confer the privilege of incumbency status upon only those circuit judges whose terms expire January 1, 1979 and deny the same to all others it could be expected to have said so either in the amendatory act or elsewhere.

Since Judge Beer is "[a]n elected incumbent circuit judge in a circuit in which the number of circuit judges has been increased by [the] amendatory act", which is the category to which the Legislature has expressly and unqualifiedly extended the privilege of an incumbency designation in the forthcoming primary election, he is entitled to become a candidate by filing his affidavit of candidacy under the provisions of §4.

I would deny the requested relief.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true

and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 31st day of July in the year of our Lord one thousand nine hundred and seventy-eight.

By: (s) Harold Hoag
Clerk

[SEAL]

Exhibit A
Exhibit B
Exhibit C

Supreme Court, U. S.
FILED
FEB 7 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-1110

WILLIAM JOHN BEER, Judge Oakland County Circuit Court, As a Candidate and Citizen,

Petitioner,

vs

SECRETARY OF STATE OF THE STATE OF MICHIGAN and THE CLERK OF THE COUNTY OF OAKLAND,

Respondents.

On Petition For a Writ of Certiorari To The Supreme Court of The State of Michigan

BRIEF FOR RESPONDENT SECRETARY OF STATE OF THE STATE OF MICHIGAN IN OPPOSITION

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-1110

WILLIAM JOHN BEER, Judge Oakland County Circuit Court, As a Candidate and Citizen,

Petitioner,

vs

SECRETARY OF STATE OF THE STATE OF MICHIGAN and THE CLERK OF THE COUNTY OF OAKLAND,

Respondents.

On Petition For a Writ of Certiorari To The Supreme Court of The State of Michigan

BRIEF FOR RESPONDENT SECRETARY OF STATE OF THE STATE OF MICHIGAN IN OPPOSITION

OPINIONS BELOW

The opinions of the courts below are reproduced in the Appendix to the Petition. In addition, the order of the Michigan Supreme Court is reported at *Friedman* v *Secretary of State* and *Friedman* v *Beer*, 403 Mich 825 (1978).

JURISDICTION

Respondent Secretary of State denies that this Court has jurisdiction to review the judgment by *appeal* under 28 USC § 1257(2) because this case does not draw into question the *validity* of the state statute but merely challenges the construction given to the statute by the Michigan Supreme Court. Because that construction is dependent upon state law, the

judgment is based upon an adequate and independent non-federal ground. Furthermore, Petitioner has failed to follow the proper procedure to obtain review by appeal in this Court, see Supreme Court Rules 13(2), 15.

Respondent does not deny that this Court has certiorari jurisdiction under 28 USC § 1257(3), and that this Court may regard the papers as a petition for a writ of certiorari, 28 USC § 2103.

QUESTION PRESENTED

Does the interpretation of Michigan law by the Michigan Supreme Court denying to a state circuit court judge the right to run as an incumbent for election to a separate, newly-created judgeship in the same circuit deprive the judge of Equal Protection of the Laws under the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves § 4 of 1978 PA 164 (amending, *inter alia*, MCLA 600.501, *et seq;* MSA 27A.501, *et seq*) which provides in relevant part:

> ". . . An elected incumbent circuit judge in a circuit in which the number of circuit judges has been increased by this amendatory act may become a candidate in the primary election for that office for any term for which a judge is to be elected at the 1978 general election in that circuit by filing an affidavit of candidacy with the secretary of state not later than 4 days after the effective date of this amendatory act."

This case also involves Article VI, § 19 of the Michigan Constitution of 1963 which provides:

> "The supreme court, the court of appeals, the circuit court, the probate court and other courts designated as such by the legislature shall be courts of record and each shall have a common seal. Justices and judges of courts of record must be persons who are licensed to practice law in this state. No person shall be elected or appointed to a judicial office after reaching the age of 70 years."

STATEMENT OF THE CASE

Petitioner in this action is an incumbent Michigan circuit court judge whose term of office expires January, 1981. 1978 PA 164 amended, *inter alia*, the statutes organizing state circuit courts, MCLA 600.501, *et seq;* MSA 27A.501, *et seq*, and created new judicial positions in the Sixth Judicial Circuit of the state. In the implementation portion of 1978 PA 164, Section 4 provides that "an elected incumbent circuit judge" could seek election as an incumbent to a newly-created position by filing an affidavit of candidacy. Petitioner filed an affidavit of candidacy for the August, 1978, primary election in the manner set forth in § 4.

Thereafter, on June 9, 1978, Michael S. Friedman, a candidate for a new judicial position in the Sixth Judicial Circuit of the State of Michigan filed an action for mandamus in the Michigan Court of Appeals. In that action he challenged the constitutionality of 1978 PA 164, § 4 and sought an order directing the Secretary of State of the State of Michigan to delete the name of William John Beer from the August, 1978, primary election ballot. Friedman's challenge to the constitutionality of the statutory provision was based upon the belief that § 4 enabled an elected incumbent circuit judge whose term was not expiring to seek election to a newly-created judicial position within the same circuit. The de-

fendants in the action filed by Friedman were Richard H. Austin, Secretary of State for the State of Michigan, and William John Beer, the Petitioner before this court.

At the same time that Friedman filed his complaint for mandamus with the Michigan Court of Appeals he also filed an action for declaratory judgment and injunctive relief in the Circuit Court for the County of Oakland, Michigan.

On June 28, 1978, the Michigan Court of Appeals issued an order denying Friedman's complaint for mandamus "for lack of merit in the grounds presented" (Petitioner's Appendix 6a).

On July 14, 1978, the Oakland County Circuit Court in the separate action filed by Michael S. Friedman issued an opinion which held that Petitioner William John Beer was entitled to participate in the primary election as a candidate for one of the newly-created judicial positions. Petitioner's Appendix 2a-5a. The Oakland County Circuit Court case was consolidated in the Supreme Court with the Court of Appeals case.

On July 31, 1978, the Michigan Supreme Court ordered the Secretary of State to delete the name of William John Beer from the list of candidates certified for the August 8, 1978, Sixth Judicial Circuit primary election. The court construed 1978 PA 164, § 4, so as to permit only those incumbent judges whose terms would expire on January 1, 1979, to seek election to the newly-created judicial positions. Petitioner's Appendix 7a-8a.

ARGUMENT

THE INTERPRETATION OF MICHIGAN LAW BY THE MICHIGAN SUPREME COURT DENYING TO A STATE CIRCUIT JUDGE THE RIGHT TO RUN AS AN INCUMBENT FOR ELECTION TO A SEPARATE NEWLY-CREATED JUDGESHIP IN THE SAME CIRCUIT DOES NOT DEPRIVE THE JUDGE OF EQUAL PROTECTION OF THE LAWS UNDER THE UNITED STATES CONSTITUTION.

A. The Challenge to the Michigan Supreme Court's Interpretation of Michigan Election Law Does Not Present Any Substantial Federal Question.

Assuming that the Petitioner is seeking review by certiorari (28 USC § 1257(3)) rather than appeal (28 USC § 1257(2)), he must assert a violation of a right claimed under the Constitution of the United States. It is apparent from the phrasing of the first question presented in the petition that he asserts such a violation (denial of Equal Protection of the Laws) only by the *interpretation* of the statute and does not challenge the statute itself since he argues that the plain words of the act are sufficient to demonstrate its validity. In order to run as an incumbent for a newly-created judgeship Petitioner, a state circuit court judge, sought to file for candidacy under § 4 of 1978 PA 164, an implementation provision of a statute changing the number of state circuit judges. Persons qualifying to file for candidacy as incumbents for the new position could do so by merely filing an affidavit; others had to obtain voter signatures on nominating petitions.

The Michigan Supreme Court concluded that Petitioner "is not qualified to file for candidacy as an incumbent" within the meaning of the statute. Appendix to the petition, 7a. In reaching this conclusion the court determined that the statute

in the same circuit at the same time. There is nothing in the Michigan election law which would compel Petitioner or any other incumbent circuit judge to resign from the position with the shorter term. Furthermore, even if such a judge were to resign from the position with the shorter term upon election to the new position, the state would have then been faced with the necessity of filling a new vacancy.

Certiorari is granted only when a federal question of substance is presented for review, *Rice* v *Sioux City Memorial Park Cemetery*, 349 US 70 (1955) and the insubstantiality of any federal question in this case is apparent when it is recalled that the construction of the statute is the responsibility of the Michigan Supreme Court, not a federal court. *Standard Oil Company* v *Johnson*, 316 US 481, 483; 62 S Ct 1168; 86 L Ed 611 (1942). In *Beck* v *Washington*, 369 US 541, 554-555; 8 L Ed 2d 98; 82 S Ct 935 (1962), this Court stated:

> ". . . We have said time and again that the fourteenth amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial errors . . .' [Citation omitted] Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question. . . ."

In the context of state statutes pertaining to qualification for election to public office, the burden of demonstrating an Equal Protection violation is a severe one, as shown by this Court's decision in *Snowden* v *Hughes*, 321 US 1, 8 (1943):

> "But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a

divided elected incumbent circuit judges into two categories. The first category consisted of judges whose terms of office expired January 1, 1979. The second category, which included Petitioner, encompassed judges whose terms of office expired after January 1, 1979, the commencement date of the newly-created judgeship. Under 1978 PA 164, § 4, as construed, the judges in the first category were qualified to run as incumbent candidates for the new judgeships in the same circuit. The judges in the second category, including Petitioner, were not qualified to run as incumbent candidates for the new judgeships.

Although this interpretation of the statute might be said to create a classification since only certain persons could qualify to file for candidacy as an incumbent, Respondent submits that the classification is reasonable and is based upon important and legitimate public policy considerations. The state is entitled to create a classification if there is a rational basis for the classification, *Kotch* v *Board of River Port Pilot Commissioners*, 330 US 552; 67 S Ct 910; 91 L Ed 1093 (1947).

The Michigan Supreme Court construed 1978 PA 164, § 4, in a fashion which prevented circuit court judges occupying non-expiring terms from hopping from one judicial position to another within the same circuit. This construction of the statute makes a rational distinction between categories of circuit court judges and does not deny judges in the second category equal protection of the law. The judges in the first category, if elected, would not have served overlapping terms because their previous terms expired January 1, 1979, the identical day on which the new terms commenced. On the other hand, judges in the second category, such as Petitioner, occupy terms which did not expire on January 1, 1979. As a result if Petitioner or any other judge in the second category could have sought and won election to a new circuit judgeship, such individual would have occupied two judicial positions

denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person . . . or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. . . . But a discriminatory purpose is not presumed . . . there must be a showing of 'clear and intentional discrimination,' . . . ." (citations omitted).

B. Petitioner's Challenge to a Section of the Michigan Constitution Was Not Raised in the State Courts and is Therefore Not Properly Before This Court.

In his second argument Petitioner appears to challenge Mich Const 1963, Art VI, § 19 which prohibits the appointment or election of a person to judicial office after reaching the age of 70 years. Petitioner is currently 69 years of age and his present term of office expires in January 1981, at which time he will be over 70. In the petition he seems to suggest that the Michigan Supreme Court interpreted 1978 PA 164 § 4 as it did in order to prevent him from remaining on the bench after attaining 70 years of age but such a suggestion has no basis in fact. Petitioner's age had no bearing

on the court's construction of the statute because that construction merely prevented judges occupying non-expiring terms, regardless of age, from seeking election as incumbents to newly-created judgeships in the same circuit.

Furthermore, the constitutionality of Article VI, § 19 of the Michigan Constitution and its effect on Petitioner's claim was never raised in the proceedings before the state courts. This Court has held on numerous occasions that in order to give the Supreme Court of the United States jurisdiction to review a final judgment of the highest court of a state, a claim of federal right must be asserted in some fashion before the state court, e.g. *Socialist Labor Party* v *Gilligan*, 406 US 583 (1972), *Hartford Life Insurance Company* v *Johnson*, 249 US 490 (1919). Although Petitioner may wish at a later date to challenge the constitutionality of Article VI, § 19 of the Michigan Constitution which will have the effect of preventing him from seeking reelection when his current term of office expires, the question as presently framed is premature. The existence of a real federal question is essential to the jurisdiction of the Supreme Court of the United States to review judgments of state courts, e.g. *Caldwell* v *Texas*, 137 US 692 (1891), *Equitable Life Assurance Society* v *Brown*, 187 US 308 (1902).

As indicated by the unique facts of this case it is apparent that the issue raised by Petitioner—the validity of a construction of a state statute pertaining to a ballot designation as an incumbent—will affect few, if any, persons other than Petitioner. The minimal importance of this case is further emphasized by the fact that the election in which Petitioner sought to file for candidacy as an incumbent has already taken place and because of this possible mootness it is difficult to see what relief might be available to him under the circumstances.

CONCLUSION

For the foregoing reasons, it is requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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